Supreme Court, U.S.
FILED
FEB 26 1991
OFFICE OF THE CLERK

No. 90-1112

In The

Supreme Court of the United States

October Term, 1990

TOTAL CONDO CONCEPTS, INC., and STEWART TITLE GUARANTY COMPANY,

Petitioners,

v.

COUNTY OF SAN DIEGO and MICHAEL SGOBBA, AS MARSHAL OF THE COUNTY OF SAN DIEGO,

Respondents.

Petition For Writ Of Certiorari To the Court Of Appeal For The State Of California, Fourth Appellate District, Division One

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LLOYD M. HARMON, Jr.,
County Counsel
Counsel of Record

County of San Diego
DIANNE BARDSLEY, Chief Deputy
By LEONARD W. POLLARD II, Deputy
1600 Pacific Highway, Room 255
San Diego, California 92101
Telephone: (619) 531-4860

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

SUMMARY OF FACTS 1

STATEMENT OF THE CASE..... 2

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED 4

1. There is No Jurisdictional Basis For Supreme Court Review..... 4

2. The State Court Decided the Denial of Due Process Issue in Reliance Upon the Applicable Decisions of This Court..... 4

3. A Claim For Violation of Due Process Does Not Lie Because Plaintiffs Have Not Challenged Enforcement of Judgments Law as Being Unconstitutional 6

4. Due Process Does Not Require That the Marshal Be a Guarantor of Notice Under the Statute 8

5. The Fundamental Requirement of Due Process is the Opportunity to Be Heard. Petitioners' Due Process Rights Were Satisfied 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Grannis v. Ordean, 234 U.S. 385 (1914) 9

Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306 (1949) 8, 9

Nelson v. New York, 352 U.S. 103 (1956) 8

Parratt v. Taylor, 451 U.S. 527 (1981) 6, 7, 8

The Mary, Stafford, Master, U.S. 9 Cranch 126 (1815) 9

Tulsa Collection Servs. v. Pope, 485 U.S. 478 (1988) 8

STATUTES

28 United States Code Section 1257(a) 4

Code of Civil Procedure

Section 680.010 to 724.260 5

Section 687.040(a) 7

Section 701.560(b) 7

Section 701.680(c) 8

Section 720.140(a)(3) 5

Section 720.160(a)(1) 5

Section 720.610-720.630 5

Section 720.620(b)(1) 6

Section 995.370 ..... 5, 6

MISCELLANEOUS

Supreme Court Rules, Rule 10.1, subsection (c) 4

SUMMARY OF FACTS

This is a Petition for Certiorari filed by Total Condo Concepts (hereinafter "TCC") and Stewart Title Guarantee Company (hereinafter "Stewart") seeking review of a decision of the California Court of Appeal, Fourth Appellate District, Division One.[1] The case involves twenty-six condominiums which were sold to satisfy a judgment. The sale was conducted by the Marshal of the County of San Diego (hereinafter "Marshal") pursuant to California laws prescribed for the execution, levy and sale of property.

The judgment creditor obtained a default judgment for $210,206.01. The judgment creditor then obtained a writ of execution and caused its levy on the condominiums. Later during the proceedings, but before the sale, TCC acquired the condominiums. Stewart issued defective title insurance on them.

When TCC learned of the impending sale, it filed a "third-party claim" with the Marshal asserting an interest in the condominiums superior to that of the judgment creditor, and seeking to stop the execution sale. The third-party claim was served on the judgment creditor.

As provided by statute, the judgment creditor filed a bond for the benefit of TCC in order to allow the execution sale to proceed. However, the judgment creditor

---

[1] Petition for Writ of Certiorari (hereinafter "Petition") with a copy of the California Court of Appeal unpublished opinion (hereinafter "Opinion") attached in the Appendix, pp. 19-50; the facts set forth therein are accurately stated (Opinion, pp. 19-22 of the Appendix) and briefly summarized here.

failed to follow the statute by not serving TCC with a copy of the bond before filing the original with the Marshal. No proof of service on TCC accompanied the bond as required by statute. The Marshal had no statutory duty to examine the bond, test its validity or verify that it had been properly served on TCC. Accordingly, he accepted the bond and the property was sold.

TCC made claims under the title insurance policy issued by Stewart. In settlement of those claims, Stewart paid to clear title to the property. This action ensued.

STATEMENT OF THE CASE

TCC and Stewart sued the judgment creditor, the judgment creditor's attorneys, the County of San Diego[2] and the Marshal to recoup the amounts spent to clear title to the property and to recoup the profits lost in being unable to market the condominiums. (Opinion, App. 22-24; see also attachment herein.) The trial court sustained the Marshal's demurrer to petitioners' third amended complaint without leave to amend and judgment was entered in favor of the Marshal.

The petitioners proceeded against the judgment creditor and its attorneys, who also filed a cross-complaint against petitioners. As trial approached, petitioners settled with the judgment creditor for a mutual release of all claims between the parties. The case proceeded against

[2] The County's only involvement is by virtue of the acts of the Marshal in this matter. Therefore, Respondents are collectively referred to as "Marshal" unless otherwise indicated.

the judgment creditor's attorneys. After a lengthy jury trial, the trial court granted motions for non-suit by the judgment creditor's attorneys on the main action and on the cross-complaint. (See attached Notice of Motion for Determination of Good Faith Settlement and for an Order Barring Future Claims for Contribution or Indemnity filed by the attorney for the judgment creditor.)[3]

Among the multiple causes of action stated in their underlying complaint, petitioners alleged a cause of action for denial of due process against the Marshal. Petitioners alleged that they were denied due process when the Marshal accepted the judgment creditor's bond without proof of service on TCC.

The California Court of Appeal disagreed, finding that petitioners had not challenged the statutory scheme itself as constituting a denial of due process. (Opinion, App. 43.) Instead, the appellate court found petitioners had alleged deprivation resulting from the judgment creditor and Marshal's failure to comply with the statutory procedure. The appellate court reasoned that since petitioners could have filed their own bond to release the property from sale when the third party claim was filed, adequate state remedies for damages were available to redress that deprivation. (Opinion, App. 39, 43-44). In addition, the appellate court noted petitioners had other available options for seeking a stay of the sale. With all

---

[3] After the Marshal obtained judgment in the case, the names of the County and the Marshal were dropped from the case name. The Superior Court case numbers for this case and for the attached motion for good faith settlement are the same, even though the initial defendants' names are different.

these remedies available, there was ample due process available for remedying any notice deficiency.

The California Supreme Court denied review.

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

1. There is No Jurisdictional Basis for Supreme Court Review.

This Court's review is sought pursuant to 28 U.S.C. section 1257(a) (Petition, p. 2). That section authorizes review "where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution . . . ". There is no state statute being drawn into question in this case – only behavior which stems from a judgment creditor's failure to comply with a state statute. Liability was sought to be imposed upon the Marshal for not insuring the judgment creditor's compliance. The Court of Appeal held that the Marshal had no such duty. Other remedies were available. Consequently, there is no federal question for this Court's review. The Petition should be denied.

2. The State Court Decided the Denial of Due Process Issue In Reliance Upon the Applicable Decisions of This Court.

The Supreme Court Rules provide that a petition for writ of certiorari will be granted only when there are "special and important" reasons therefor. (See Supreme Court Rules, Rule 10.1, subsection (c).) In the instant case, the state court has found that the statute itself is not

being challenged constitutionally and that the statute has adequate remedies to satisfy requirements of due process, for failure of the judgment creditor to follow the statutory requirements. This conclusion was reached in reliance upon the decisions of this Court. The granting of a petition for writ of certiorari is not warranted in this case because there are no "special and important" reasons.

This case involves a unique chronology of facts arising under California's Enforcement of Judgments Law. (California Code of Civil Procedure sections 680.010 to 724.260; hereinafter all statutory references are to the California Code of Civil Procedure.) The provisions of this law are set forth at pages 7 and 8 of the Petition. Under this law, a person claiming a superior ownership interest to a judgment creditor seeking to foreclose on real property to satisfy a judgment, may file a "third-party claim" with the Marshal. The third-party claim may be filed with or without a bond. If the third-party claimant files a bond when the claim is filed, the marshal must release the property from sale, and the judgment creditor can take no further steps. (§ 720.140(a)(3)). When a third-party claim is filed without a bond, the marshal may not sell the property unless the judgment creditor files a bond for the benefit of the third-party claimant. (§ 720.160(a)(1); Petition, App. 8.) A copy of the judgment creditor's bond must be served on the third-party claimant and be accompanied by an affidavit of service when it is filed. (§ 995.370.)

If the judgment creditor serves and files a bond in an effort to have the real property sold, the third-party claimant may file a counter-bond which releases the property from levy. (§§ 720.160(a)(1), 720.610-720.630;

App. 8-9, App. 10-12.) This counter-bond may be filed at any time before the levying officer sells the property. (§ 720.620(b)(1); Petition, App. 11.)

In this case, the petitioners filed the third-party claim without a bond. Petitioners took a risk that, upon presentation of a judgment creditor's bond to the Marshal, they could file a counter-bond before the property was sold. The Marshal is not a "guarantor" of service of an undertaking – i.e. the Marshal is not required to guarantee that the judgment creditor's undertaking was properly served by the judgment creditor on the judgment debtor pursuant to section 995.370. (Opinion, App. 26-27, fn. 4.) This case does not present any special or important reasons for this Court to grant review. The Petition should be denied.

3. A Claim For Violation of Due Process Does Not Lie Because Plaintiffs Have Not Challenged the Enforcement of Judgments Law as Being Unconstitutional.

In this case, the state court determined quite correctly that petitioners did not challenge the Enforcement of Judgments Law as being unconstitutional. Instead, petitioners merely alleged deprivation of property rights resulting from the Marshal's alleged failure to follow the statutorily prescribed procedure. (Opinion, App. 43.) As this Court stated in *Parratt v. Taylor*, 451 U.S. 527 (1981):

> "Its seems to us that there is an important difference between a challenge to an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers. In the former situation the facts satisfy the most literal reading of the Fourteenth Amendment's prohibition against

> 'State' deprivations of property; in the latter situation, however, even though there is action 'under color of' state laws sufficient to bring the amendment into play, the state action is not necessarily complete. For in a case such as this the law of Illinois provides, in substance, that the plaintiffs' entitled to be made whole for any loss of property occasioned by the unauthorized conduct of the prison guards. We may reasonably conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment."

In *Parratt, supra,* at page 543, this Court concluded that the claimant had not correctly alleged a violation of due process:

> "Although he has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure. There is no contention that the procedures themselves are inadequate. . . . Moreover, the State . . . has provided respondent with the means by which he can receive redress for the deprivation." (See Opinion, App. 42-43.)

The Court of Appeal determined that petitioners had not stated a cause of action for denial of due process under the federal constitution. (Opinion, App. 41-44.) It held that petitioners' alleged deprivation resulted from the Marshal's conduct, not from the statutory provisions. The Court noted that petitioners had a means of redress for the alleged deprivation. (See §§ 687.040(a), 701.560(b),

701.680(c); Opinion, App. 43-44.) The Court obviously held the *Parratt* decision to be directly applicable to the facts of this case.

4. Due Process Does Not Require That the Marshal Be a Guarantor of Notice Under the Statute.

Petitioners allege they suffered deprivation of their property without prior notice and the opportunity to respond. (Petition, p. 5.) Petitioners assert that the Marshal, as an agent of the State, has a duty to refrain from acting until he has satisfied requirements of notice. (Petition, p. 10.) Petitioners also assert that regardless of who is to serve the bond, if the Marshal conducts the sale in the absence of service, due process is denied. (Petition, p. 12.) This common theme runs throughout the Petition.

No case has been found which requires the Marshal to personally insure that notice has been given. In no decision of this Court has a public officer had the ultimate responsibility to verify, before acting, that private parties have properly given notice to others. On the contrary, this Court has specifically approved statutory procedures in which notice requirements were delegated to private parties without any provision requiring a public officer to verify compliance by the private party. (See *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1949); *Tulsa Collection Servs. v. Pope*, 485 U.S. 478 (1988); *Nelson v. New York*, 352 U.S. 103 (1956).) The law should presume that private parties will comply with statutory requirements. If they don't, the resulting liability should remain with the private parties, not shifted to public

officers for not verifying compliance. Applying this principle to this case, the Marshal should not be required to guarantee service of notice by the judgment creditor. He should not have to guarantee that service has been accomplished by others who themselves should be expected to comply with state statutes. This Court has previously held this to be the law. The issue needs no review and the Petition should be denied.

5. The Fundamental Requirement of Due Process is the Opportunity to Be Heard. Petitioners' Due Process Rights Were Satisfied.

In *Mullane v. Central Hanover Bank and Trust Co., supra,* at p. 314, this Court reiterated the principle " 'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis v. Ordean* (1914) 234 U.S. 385, 394. . . . " Petitioners in this case had notice and also exercised their opportunity to be heard by filing a third-party claim when their interest was placed in jeopardy by a possible execution sale. This Court has noted that an owner of property must be at least minimally vigilant in protecting his property. "The ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights." (*Mullane, supra,* at p. 316.) In quoting from Chief Justice Marshal in *The Mary, Stafford, Master,* U.S. 9 Cranch 126, 144 [3 L.Ed. 678, 684] (1815) " 'It is the part of common prudence for all those who have any interest in [a thing] to guard that interest by persons who are in a situation to protect it.' " (*Mullane, supra,* at p. 316.)

Petitioners had notice and exercised their opportunity to be heard. Their due process rights have been met. Indeed, the court ultimately denied petitioners' third-party claim, finding the execution lien was superior to any interest of Petitioner in the property. (Petition, Opinion, App. 40, fn. 15.) Petitioners state no special and important reasons for review by this Court. The Petition should be denied.

CONCLUSION

For the reasons set forth above, the Petition should be denied. A claim for denial of due process does not lie. The Marshal is not required to guarantee that a judgment creditor comply with statutory notice requirements. In addition, petitioners had abundant opportunity to be heard and their due process rights were satisfied.

Respectfully submitted,

LLOYD M. HARMON, JR.
County Counsel
Counsel of Record

County of San Diego
DIANE BARDSLEY
Chief Deputy
By LEONARD W. POLLARD II, Deputy
1600 Pacific Highway, Room 355
San Diego, California 92101-2469
Telephone: (619) 531-4860

EXHIBIT

LEWIS, D'AMATO, BRISBOIS & BISGAARD
R. GAYLORD SMITH
JANICE GAY GIBBONS
550 West C Street, Suite 800
San Diego, California 92101
Telephone: (619) 233-1006

Attorneys for Defendants and
Cross-Complainants STEVEN L. VICTOR;
RUDICK, PLATT & VICTOR; and STEVEN
L. VICTOR, A.P.C.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

TOTAL CONDO CONCEPTS, INC., a California corporation; and STEWART TITLE GUARANTY COMPANY, a Texas corporation, Plaintiffs, vs. MARIO MECHETTI and RUSSELL CORNELIUS, individually and doing business as MICHETTI AND CORNELIUS ADVERTISING; STEVEN L. VICTOR, a California professional corporation; STEVEN L. VICTOR; ANTHONY T. DITTY; RUDICK, PLATT & VICTOR, a partnership including professional corporations and DOES 1 through 200, inclusive, Defendants.	Case No. 540558 NOTICE OF MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT AND FOR AN ORDER BARRING FUTURE CLAIMS FOR CONTRIBUTION OR INDEMNITY Date: September 28, 1990 Time: 10:30 a.m. Dept: 31 (Telephonic Ruling) Judge Ben Hamrick

STEVEN L. VICTOR, a California professional corporation; STEVEN L. VICTOR; ANTHONY T. DITTY; RUDICK, PLATT & VICTOR,

Cross-Complainants,

vs.

TOTAL CONDO CONCEPTS, INC., a California Corporation, and STEWART TITLE GUARANTY CO., a Texas corporation, WILLIAM PETTERSON, AMERICAN SAVINGS & LOAN ASSOCIATION, AMERICAN REAL ESTATE ASSOCIATES ("AREA"), JOHN F. KULLERSTRAND AND ROES 201-300, inclusive,

Cross-Defendants.

TO ALL PARTIES, THEIR ATTORNEYS OF RECORD AND ALL OTHERS:

PLEASE TAKE NOTICE that on September 28, 1990 at 10:30 a.m. or as soon thereafter as the matter may be heard before the Honorable Ben Hamrick in Department 31 of the above-entitled court located at 220 West Broadway, San Diego, California defendants STEVEN L. VICTOR, RUDICK, PLATT & VICTOR and STEVEN L. VICTOR, A.P.C., will move this court for an order of determining that the settlement entered into between plaintiffs and attorney defendants was made in good faith and for an order barring future claims by the parties

and all other persons and entities against attorney defendants, and their agents, for indemnity or contribution arising out of the transaction referenced in the above-captioned action.

This motion is based upon California Code of Civil Procedure Sections 877.6, the memorandum of points and authorities submitted herewith, the declaration of Janice Gay Gibbons and the pleadings and records on file in this action.

DATED: September 4, 1990

LEWIS, D'AMATO, BRISBOIS & BISGAARD

By: /s/ Janice Gay Gibbons
JANICE GAY GIBBONS
Attorneys for Defendants and Cross-Complainants STEVEN L. VICTOR; RUDICK, PLATT & VICTOR; and STEVEN L. VICTOR, A.P.C.

PROOF OF SERVICE

San Diego Superior Court

Case No: 540558

I, the undersigned, am over the age of eighteen years and am a resident of San Diego County, California; I am not a party to the above-entitled action; my business address is 550 West C Street, Suite 800, San Diego, California 92101.

On September 4, 1990, I served the following document(s):

NOTICE OF MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT AND FOR AN ORDER

BARRING FUTURE CLAIMS FOR CONTRIBUTION OR INDEMNITY; MEMORANDUM OF POINTS AND AUTHORITIES and; DECLARATION OF JANICE GAY GIBBONS IN SUPPORT THEREOF.

addressed to:

Mark Zebrowski, Esq.
Gray, Cary, Ames & Frye
401 B Street, Ste 1700
San Diego, CA 92101

Murry M. Bankhead, Esq.
Solomon, Ward,
Seidenwurm & Smith
401 B Street, Ste 1200
San Diego, CA 92101

James Hill, Esq.
Sullivan, Hill, Lewin &
Markham
550 West C Street, Ste 1500
San Diego, CA 92101

Floyd Harmon
County Counsel
355 County Administration
Center
1600 Pacific Highway
San Diego, CA 92101

XX (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at San Diego, California.

___ (BY TELECOPIER) In addition to service by mail as set forth above, the counsel by whose name an asterisk is affixed on the attached service list were also forwarded a copy of said document(s) by telecopier.

___ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 4, 1990, at San Diego, California.

/s/ Valerie M. Biladeau
VALERIE M. BILADEAU

LEWIS, D'AMATO, BRISBOIS & BISGAARD
R. GAYLORD SMITH
JANICE GAY GIBBONS
550 West C Street, Suite 800
San Diego, California 92101
Telephone: (619) 233-1006

Attorneys for Defendants and
Cross-Complainants STEVEN L. VICTOR;
RUDICK, PLATT & VICTOR; and STEVEN
L. VICTOR, A.P.C.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

TOTAL CONDO CONCEPTS, INC., a California corporation; and STEWART TITLE GUARANTY COMPANY, a Texas corporation, Plaintiffs, vs. MARIO MECHETTI and RUSSELL CORNELIUS, individually and doing business as MICHETTI AND CORNELIUS ADVERTISING; STEVEN L. VICTOR, a California professional corporation; STEVEN L. VICTOR; ANTHONY T. DITTY; RUDICK, PLATT & VICTOR, a partnership including professional corporations and DOES 1 through 200, inclusive, Defendants.	Case No. 540558 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT AND FOR AN ORDER BARRING FUTURE CLAIMS FOR CONTRIBUTION OR INDEMNITY Date: September 28, 1990 Time: 10:30 a.m. Dept: 31 (Telephonic Ruling) Judge Ben Hamrick

STEVEN L. VICTOR, a California professional corporation; STEVEN L. VICTOR; ANTHONY T. DITTY; RUDICK, PLATT & VICTOR,

Cross-Complainants,

vs.

TOTAL CONDO CONCEPTS, INC., a California Corporation, and STEWART TITLE GUARANTY CO., a Texas corporation, WILLIAM PETTERSON, AMERICAN SAVINGS & LOAN ASSOCIATION, AMERICAN REAL ESTATE ASSOCIATES ("AREA"), JOHN F. KULLERSTRAND AND ROES 201-300, inclusive,

Cross-Defendants.

I. INTRODUCTION

Defendants, STEVEN L. VICTOR; RUDICK, PLATT & VICTOR; and STEVEN L. VICTOR, A.P.C. (hereinafter "Rudick") have brought this motion for an order determining that the settlement of the above-entitled action is in good faith and discharges defendants from any and all liability for total, partial or comparative indemnity or contribution pursuant to the provisions of Sections 877 and 877.6 of the California Code of Civil Procedure.

II. STATEMENT OF FACTS

The plaintiffs' causes of action for fraud and abuse of process against Rudick came to trial on January 14, 1990

in Department 31 of the above-entitled court, the Honorable Ben W. Hamrick, presiding. Prior to the selection of the jury, the court in dealing with motions in limine severed Total Condo Concepts, Inc. from the trial based upon its pending bankruptcy proceeding and also the suspension of its corporate franchise by the State of California.

The case of Stewart Title then proceeded to trial. On February 6, 1990, after the plaintiff had concluded its case in chief and rested, the defendants moved the court for an order granting a nonsuit as to plaintiffs' causes of action for fraud and abuse of process. The court found that there was not sufficient evidence of fraud on the part of the defendants to allow that issue to go to the jury and granted defendants' motion for nonsuit as to that cause of action. The court took the motion for nonsuit as to the cause of action for abuse of process under submission until the completion of the defendants case stating that it wanted to review the authority cited and research the law. The defendants' then put on their case before the jury and all evidence was received and all parties rested on February 7, 1990.

At that time cross-defendant Stewart Title moved the court for an order granting nonsuit as to Rudick's cross-complaint for abuse of process. After further oral argument was presented by counsel as to both motions for nonsuit, the court found that there was no evidence that either party to this action willfully used or misused the processes of the court for any collateral or unrelated improper purpose as required by the California case law and, therefore, the respective motions for nonsuit should be granted. Accordingly, the motions for nonsuit as to the

complaint and the cross-complaint of the respective parties were granted on February 8, 1990.

In February 1990 the plaintiffs settled with co-defendants Mario Michetti and Michetti and Cornelius Advertising resulting in a mutual release of all claims between those parties.

The plaintiffs had also alleged a cause of action against the county of San Diego and its Marshal Michael Sgobba. The court granted a demurrer to these causes of actions, entering a judgment of dismissal in favor of the County and the Marshal. At the time of trial, plaintiffs' appeal as to this judgment was pending. However, on July 19, 1990, the court of appeal rendered its decision upholding the trial court's judgment of dismissal as to these parties.

Total Condo is the debtor in a bankruptcy case pending in the United States Bankruptcy Court for the Southern District of California, Case Number 89-05172-LM11. This settlement with Total Condo Concepts, Inc. is contingent upon an order approving the compromise by the bankruptcy court. The trustee in bankruptcy has submitted an application for the bankruptcy court's approval. Notice of intent to settle this lawsuit was served in the bankruptcy case in August, 1990. This motion is made subject to obtaining the bankruptcy court's approval which is anticipated to be granted on or before September 30, 1990.

III. THE COURT HAS THE AUTHORITY TO DETERMINE THAT THE SETTLEMENT WAS MADE IN GOOD FAITH

Code of Civil Procedure Section 877.6 gives the court discretion to determine whether a settlement by a joint

tortfeasor is made in good faith. Code of Civil Procedure Section 877.6 provides, in pertinent part, as follows:

> (a) "Any party to an action wherein it is alleged that two or more parties are joint tortfeasors . . . shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasor. . . .
>
> (b) The issue of the good faith settlement may be determined by the court on the basis of affidavits served with the notice of hearing, and any counteraffidavits filed in response thereto, or the court may, in its discretion, receive other evidence at the hearing."

The Rudick defendants hereby request the court, pursuant to Code of Civil Procedure Section 877.6 to make a determination that this settlement was made in good faith.

IV. DETERMINATION THAT A SETTLEMENT IS IN GOOD FAITH IS PROPER WHERE IT IS WITHIN THE REASONABLE RANGE OF DEFENDANTS' PROPORTIONATE SHARE OF LIABILITY, AND MEETS THE TECH-BILT CRITERIA FOR A GOOD FAITH DETERMINATION

In *Tech-Bilt, Inc., v. Woodward, Clyde & Associates,* 38 Cal. 3d 488 (1985), the California Supreme Court recognized that many factors determine whether a settlement is made in good faith pursuant to Code of Civil Procedure Section 877. The *Tech-Bilt* court held that the intent and policies underlying Section 877.6 require that the following factors be taken into account in making a determination of good faith settlement:

1. A rough approximation of plaintiff's total recovery;
2. The settlor's proportionate liability;
3. The actual amount paid in settlement;
4. The recognition that a settlor should pay less in settlement then he would if he were found liable after a trial;
5. The financial condition and insurance policies of the settling defendant; and
6. The existence of collusion, fraud, or tortious conduct aimed at the interests of the nonsettling defendants.

Id. at page 499-500.

The *Tech-Bilt* court indicated that it was enunciating a "reasonable range" test which would leave substantial latitude to the settling parties and discretion to the court. *Id.*, at 500.

In the present action, Rudick's settlement with the plaintiffs falls squarely within the guidelines articulated in *Tech-Bilt*. After hearing the evidence in this matter, but prior to the case being submitted to the jury, the court granted a nonsuit against Stewart Title dismissing the claims altogether. Therefore, it is clear that Rudick's proportionate liability is nil. Further, plaintiffs' claims against all known co-defendants have been resolved without any defendants paying damages to the plaintiffs. Therefore, there are no known parties who would be impacted by this settlement. Clearly, this settlement falls within the *Tech-Bilt* guidelines and it should be determined to be a good faith settlement.

V. THE PARTY ASSERTING THE LACK OF GOOD FAITH HAS THE BURDEN OF PROOF ON THAT ISSUE

The party asserting the lack of good faith has the burden of proving that issue pursuant to California Code of Civil Procedure Section 877.6(d). Further, the party asserting lack of good faith must demonstrate that the settlement is so far "out of the ball part" in relation to the *Tech-Bilt* factors as to be inconsistent with the equitable objectives of Code of Civil Procedures Section 877.6. *Tech-Bilt, Inc. v. Woodward, Clyde & Associates, supra* 38 Cal.3d 499-500. Hence, in the present action, any party opposing this motion for good faith settlement carries the burden of proving that Rudick's settlement is outrageously disproportionate to their liability and inconsistent with the objectives enunciated in *Tech-Bilt*.

The proposed settlement between Rudick and the plaintiffs clearly is within "the ball park" in relation to the aforementioned factors so as to be consistent with the equitable objectives of Section 877.6.

VI. A DETERMINATION THAT THIS SETTLEMENT WAS MADE IN GOOD FAITH BARS ALL CLAIMS FOR INDEMNITY OR CONTRIBUTION

A court determination that a settlement was made in good faith bars other joint tortfeasors from making any further claims against the settling tortfeasor for equitable comparative contribution, or partial or comparative indemnity based on comparative negligence or comparative fault. California Code of Civil Procedure Section 877.6(c). Further, such a determination shall discharge a

tortfeasor to whom it is given from all liability contribution to any other tortfeasor. Code of Civil Procedure Section 877.

Recently the California Supreme Court in *Far West Financial Corporation v. D&S Company, Inc.*, 46 Cal.3d 796, (1988) held that a settlement determined to be in good faith bars a nonsettling tortfeasor from pursuing a claim for total equitable indemnity against a defendant who has entered into a good faith settlement. Therefore, it is clear that not only are causes of action for partial or comparative indemnity barred by a good faith determination, but causes of action for total indemnity, even if liability is based derivatively or vicariously, are barred by a good faith determination.

VII. CONCLUSION

It is respectfully requested that the court enter an order that the proposed settlement is in good faith and that the moving parties be discharged from any and all liability for total, partial or comparative indemnity or contribution in connection with or arising with any claims by the subject matter of any claims raised herein.
DATED: September 4, 1990 LEWIS, D'AMATO, BRISBOIS & BISGAARD

By: /s/ Janice Gay Gibbons
JANICE GAY GIBBONS
Attorneys for Defendants
and Cross-Complainants
STEVEN L. VICTOR;
RUDICK, PLATT & VICTOR;
and STEVEN L. VICTOR, A.P.C.

total.p&a

LEWIS, D'AMATO, BRISBOIS & BISGAARD
R. GAYLORD SMITH
JANICE GAY GIBBONS
550 West C Street, Suite 800
San Diego, California 92101
Telephone: (619) 233-1006

Attorneys for Defendants and
Cross-Complainants STEVEN L. VICTOR;
RUDICK, PLATT & VICTOR; and STEVEN
L. VICTOR, A.P.C.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

TOTAL CONDO CONCEPTS, INC., a California corporation; and STEWART TITLE GUARANTY COMPANY, a Texas corporation, Plaintiffs, vs. MARIO MICHETTI and RUSSELL CORNELIUS, individually and doing business as MICHETTI AND CORNELIUS ADVERTISING; STEVEN L. VICTOR, a California professional corporation; STEVEN L. VICTOR; ANTHONY T. DITTY; RUDICK, PLATT & VICTOR, a partnership	Case No. 540558 DECLARATION OF JANICE GAY GIBBONS IN SUPPORT OF DEFENDANTS MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT AND FOR AN ORDER BARRING FUTURE CLAIMS FOR CONTRIBUTION OR INDEMNITY Date: September 28, 1990 Time: 10:30 a.m. Dept: 31 (Telephonic Ruling) Judge Ben Hamrick

including professional corporations and DOES 1 through 200, inclusive,

Defendants.

STEVEN L. VICTOR, a California professional corporation; STEVEN L. VICTOR; ANTHONY T. DITTY; RUDICK, PLATT & VICTOR,

Cross-Complainants,

vs.

TOTAL CONDO CONCEPTS, INC., a California Corporation, and STEWART TITLE GUARANTY CO., a Texas corporation, WILLIAM PETTERSON, AMERICAN SAVINGS & LOAN ASSOCIATION, AMERICAN REAL ESTATE ASSOCIATES ("AREA"), JOHN F. KULLERSTRAND AND ROES 201-300, inclusive,

Cross-Defendants.

I, JANICE GAY GIBBONS, delcare [sic] as follows:

1. I am an attorney at law licensed to practice in the State of California and am an associate of the law firm of Lewis, D'Amato, Brisbois & Bisgaard, attorneys of record for defendants Steven L. Victor, Steven L. Victor, APC., and Rudick, Platt & Victor in the above-captioned case (hereafter "Rudick".) The facts stated below are based on

my review of the pleadings and records in this case and if called as witness, I could competently testify to the following facts.

2. The plaintiffs' causes of action for fraud and abuse of process against Rudick came to trial on January 14, 1990 in Department 31 of the above-entitled court, the Honorable Ben W. Hamrick, presiding. Prior to the selection of the jury, the court in dealing with motions in limine several Total Condo Concepts, Inc. from the trial based upon its pending bankruptcy proceeding and also the suspension of its corporate franchise by the State of California.

3. The case of Stewart Title then proceeded to trial. On February 6, 1990, after the plaintiff had concluded its case in chief and rested, the defendants moved the court for an order granting a nonsuit as to plaintiffs' causes of action for fraud and abuse of process. The court found that there was not sufficient evidence of fraud on the part of the defendants to allow that issue to go to the jury and granted defendants' motion for nonsuit as to that cause of action. The court took the motion for nonsuit as to the cause of action for abuse of process under submission until the completion of the defendants case stating that it wanted to review the authority cited and research the law. The defendants' then put on their case before the jury and all evidence was received and all parties rested on February 7, 1990.

4. At that time cross-defendant Stewart Title moved the court for an order granting nonsuit as to Rudick's cross-complaint for abuse of process. After further oral argument was presented by counsel as to both motions

for nonsuit, the court found that there was no evidence that either party to this action willfully used or misused the processes of the court for any collateral or unrelated improper purpose as required by the California case law and, therefore, the respective motions for nonsuit should be granted. Accordingly, the motions for nonsuit as to the complaint and the cross-complaint of the respective parties were granted on February 8, 1990.

5. In February 1990 the plaintiffs settled with co-defendants Mario Michetti and Michetti and Cornelius Advertising resulting in a mutual release of all claims between those parties.

6. The plaintiffs had also alleged a cause of action against the county of San Diego and its Marshal Michael Sgobba. The court granted a demurrer to these causes of actions, entering a judgment of dismissal in favor of the county and the Marshal. At the time of trial, plaintiffs' appeal as to this judgment was pending. However, on July 19, 1990, the court of appeal rendered its decision upholding the trial court's judgment of dismissal as to these parties. A Petition for Review by the Supreme Court has been filed by plaintiffs.

7. Total Condo is the debtor in a bankruptcy case pending in the United State Bankruptcy Court for the Southern District of California, Case Number 89-05172-LM11. This settlement with Total Condo Concepts, Inc. is contingent upon an order approving the compromise by the bankruptcy court. The trustee in bankruptcy through its attorney James Hill of Sullivan, Hill, Lewin & Markham, Harold S. Taxel has submitted an application for the bankruptcy court's approval. Notice of intent to settle

this lawsuit was served in the bankruptcy case. This motion is made subject to obtaining the bankruptcy court's approval which is anticipated to be granted on or before September 30, 1990.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct Executed this Fourth day of September, 1990, at San Diego, California.

LEWIS, D'AMATO, BRISBOIS & BISGAARD

By: /s/ Janice Gay Gibbons
JANICE GAY GIBBONS
Attorneys for Defendants and Cross-Complainants
STEVEN L. VICTOR;
RUDICK, PLATT & VICTOR;
and STEVEN L. VICTOR, A.P.C.

PROOF OF SERVICE BY MAIL
(Code of Civ. Proc. Section 1013(a) and 2015.5)

I, JOANIE WILLIAMS, declare:

That I am, and was at the time of service of the papers herein referred to, over the age of eighteen years, and not a party to the action; I am employed in the County of San Diego, California, the county in which the subject mailing occurred. My business address is 1600 Pacific Highway, Room 355, San Diego, California 92101-2469. I served the within ANSWER TO PETITION FOR REVIEW OF DECISION by placing a copy thereof in a separate envelope addressed to each such addressee respectively as follows:

Murray M. Bankhead, Esq.
Solomon, Ward,
Seidenwurm & Smith
401 "B" Street
Suite 1200
San Diego, CA 92101

R. Gaylord Smith, Esq.
Lewis, D'Amato, Brisbois
& Bisgaard
550 West "C" Street
Suite 800
San Diego, CA 92101

Office of the
Attorney General
110 West A Street
Suite 700
San Diego, CA 92101

Clerk of the
Superior Court
County of San Diego,
California
220 West Broadway
San Diego, CA 92101

Clerk of the Court
of Appeal
Fourth Appellate District
Division One
750 "B" Street
Suite 500
San Diego, CA 92101

William S. Boggs
Mark C. Zebrowski
Gray, Cary, Ames & Frye
401 "B" Street
Suite 1700
San Diego, CA 92101-4219

James Hill, Esq.
Sullivan, Hill, Lewin
& Markham
550 West "C" Street
San Diego, CA 92101

I then sealed each envelope and, with the postage thereon fully prepaid, deposited each into the United States mail at San Diego, California on September ___, 1990.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Diego, California on September ___, 1990.

JOANIE WILLIAMS